(3)

No. 95-1121

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

October Term, 1995

William A. Calvo, III,

Petitioner

- against -

United States Court of Appeals for the Eleventh Circuit

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue
Belleview, Florida 34420
(352) 245-4126
Petitioner

Dated: April 19, 1996

QUESTIONS PRESENTED

1. Do the Respondent's factual allegations have support in the record below?

2. Was the injunction based on primary violations of securities laws?

3. Did the Petitioner's conduct meet an appropriate definition of "recklessness?"

4. What was the basis for the vacater of the injunction by the District Court?

5. Are the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution inapplicable, in whole or in part, to federal bar disciplinary proceedings?

6. Are there any important national interests justifying the expenditure of Court time on this matter?

LIST OF PARTIES

The Parties to the proceeding below are:

William A. Calvo, III
Petitioner
11355 Southeast 54the Court; Belleview, Florida 34420

The U.S. Court of Appeals for the Eleventh Circuit
The Honorable Miguel J. Cortez, *Clerk*
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.; Atlanta, Georgia 30303

Frank C. Jones, Esquire
Counsel of Record for the Respondent
KING & SPALDING
191 Peachtree Street, N.E.; Atlanta, Georgia 30303

In addition, since this action involves an agency or officer of the United States, the Solicitor General of the United States is an interested party;

The Honorable Drew S. Days, III
Solicitor General, United States Department of Justice
Washington, D.C. 20530

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Cases

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Ex parte Robinson, 1874, 86 U.S. (19 Wall.) 505, 22 L.Ed. 205, page 8.

Florida Bar v Calvo, 630 So.2d 548 (Fla. 1993), page 1.

In re Ruffalo, 3901 U.S. 544, 547, 88 S.Ct. 1222, 1224 (1968), page 8.

In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), page 1.

Nemaizer v. Baker, 793 F.2d 58, 68 (2d Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 58 (1994), page 4.

Rufi v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992), page 4.

SEC v Electronics Warehouse, Civil Number H-86-282 (PCD), order dated May 31, 1995, pages 1, 2 and 4.

SEC v Electronics Warehouse, 689 F.Supp. 53 (D. Conn., 1988), *aff'd* 891 F.2d 457 (2nd Cir. 1989), *cert. denied*, 496 U.S. 942 (1990), pages 1, 2, 3 and 4.

Selling v Radford, 243 U.S. 46, 37 S.Ct. 377 (1917), page 8.

The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, Securities and Exchange Commission Administrative Cases Number 3-6953 and 3-6907, Exchange Act Release Number 29244; reported at 91 CCH Dec., F.Sec.L.R. Paragraph 84,828, pages 4, 5, 6 and 7.

Theard v. U.S., 1957, 77 S.Ct. 1274, 1276, 354 U.S. 278, 282, 1 L.Ed.2d 1342, page 9

United States v. Swift & Co., 286 U.S. 106, 119 (1932), page 4.

Willner v. Committee on Character, 1963, 83 S.Ct. 1175, 1179-1180, 373 U.S. 96, 102, 10 L.Ed.2d 224, page 8.

Statutes

Securities Exchange Act of 1934, as amended, Section 10(b), page 3.

Federal Rules of Appellate Procedure

Rule 46(b), pages 7 and 8.

Other Sources

Wright & Miller, *Federal Practice and Procedure*; West Publishing Co., 1996, at Section 3992 (Rule 46. Attorneys), pages 8 and 9.

REPLY TO RESPONDENT'S STATEMENT

The factual allegations of the Respondent are without any support in the record below which was limited to the decision in Florida Bar v Calvo, 630 So.2d 548 (Fla. 1993), and the Petitioner's response to the Respondent's order to show cause. Consequently, they should be disregarded by this Court.

Had the record below included all materials introduced in the Florida Bar's proceedings against the Petitioner, as well as the decisions in SEC v Electronics Warehouse, 689 F.Supp. 53 (D. Conn., 1988), *aff'd* 891 F.2d 457 (2nd Cir. 1989), *cert. denied*, 496 U.S. 942 (1990) (the "Injunction Case"), and In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990) (the "2e Case"), such materials would not have supported the Respondent's statement of the case. Material examples of the distortion of such record involve the following matters:

1. The evidence provided by Marvin Richmond as a witness for the Florida Bar demonstrated that the Petitioner did not provide a letter authorizing disbursement of escrowed proceeds or closing on the public offering, rather, Mr. Richmond testified that after the closing was under way, the Petitioner arrived, provided a letter indicating how the disbursed proceeds were to be allocated, based on instructions of the principals, but that such instructions had already been provided by the principals directly to the escrow agent.

2. The Respondent utterly distorts the decision of the District Court vacating the injunction[1] (SEC v Electronics Warehouse, Civil Number H-86-282 (PCD), order dated

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1. See pages 3 and 4 of the Respondent's Brief.

May 31, 1995, [the "Vacater Decision]. That decision rejected the contention of the Securities and Exchange Commission (in opposition to the motion) that the Petitioner had been found guilty of primary violations of securities laws. The District Court did not "receive notice that the Petitioner had resumed practice before the Securities and Exchange Commission" as the basis for its action; rather, the Petitioner filed a motion to vacate the injunction because it was being used as a predicate to disbar him, and, after a contested argument, the Court found such usage "fundamentally unfair." The following excerpts from the Vacater Decision make the Respondent's distortion clear:

> "Calvo moves to vacate the injunction that bars him from activities violative of the securities laws, SEC v The Electronics Warehouse, et. al., 698 F,Supp, 54 (D.Conn, 1988), aff'd per curium, 891 F.2d 457 (1989), cert. denied, 496 U.S. 942 (1990). He claims it should be vacated based on the current state of the law because its continuation is unnecessary and that he is suffering irreparable harm as a consequence. He was suspended from practice before the SEC until July, 1990 and was disbarred in Florida. Other cited repercussions are irrelevant here.
>
> The fraudulent conduct found was essentially that of the principals of The Electronics Warehouse. However, Calvo's responsibility was found to be sufficient to warrant the order entered. Decisions by the SEC and the Florida courts will not be reviewed in relation to this court's ruling. Moreover, facts found here will not be reconsidered based on alleged changes in SEC claims. Nor will the order be vacated based on the claim that Calvo performed "traditional lawyer's functions" ....[2]

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2. All such arguments were, however, relevant in the proceedings

Calvo's position, particularly the ongoing impact of the injunction is germane. The injunction should not be continued if it is no longer useful *and if it is having a detrimental effect on Calvo other than its intended purpose.*[3]

.... What is relevant is whether movant should be enjoined from violating security laws because without the injunction he would do so. That aiding and abetting is no longer a basis for Section 10(b) liability is also pertinent. Central Bank of Denver, N.A. v First Interstate Bank of Denver, N.A., ___ U.S. ___, 114 S.Ct. 1439, 1448 (1994).

The SEC [in its argument that the Petitioner had been found guilty of primary, rather than secondary, liability for violation of securities laws] relies on 15 U.S.C. 78(u)(d)(1), which contains no specific language reaching "aiding and abetting" that would remove it from Central Bank. The SEC, in support of its argument to enjoin aiders and abettors, cites authority which preceded Central bank. Whether the SEC had a right to seek an injunction against aider and abettor conduct was not an issue in Central Bank.

Accepting Calvo's representations, it appears that he has not violated the injunction. His SEC practice has

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below and were asserted by the Petitioner. Thus, the Petitioner demonstrated a greater basis for a *de novo* consideration of his fitness to practice law by the Respondent than he did in his successful motion to vacate the predicate injunction.

3. Emphasis added.

resumed with the SEC's consent, reflective of some confidence in his ability to comply with the law. Thus he makes a fair case for the premise that the injunction does not continue to serve a useful purpose. *He has shown that the effect of the enjoinder has gone beyond the contemplation under which it entered, which constitutes fundamental unfairness.*[4] See United States v. Swift & Co., 286 U.S. 106, 119 (1932); Rufi v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992); Nemaizer v. Baker, 793 F.2d 58, 68 (2d Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 58 (1994). The SEC has not shown that the injunction is needed for its regulatory function.

The need for finality of a decree must be balanced against an injunction's evolving consequences. An injunction which serves little purpose *or which causes consequences substantially disproportionate to its purpose must be revisited.*[5] The "obey the law" injunction here serves no such purpose to justify its tangential consequences.

For the reasons discussed above the motion (Doc. #339) is granted and the injunction as it applies to Calvo is vacated."

An examination of the record of the Florida Bar proceedings, had the Respondent allowed it, would have conclusively demonstrated that, but for Judge Dorsey's decision in the Injunction Case, no competent testimony or other evidence supported the imposition of any sanctions against the Petitioner. Consequently, Judge Dorsey's intervening

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4. Emphasis added.

5. Emphasis added.

Vacater Decision required that the Respondent conduct an independent inquiry concerning the Petitioner's fitness to practice law.

REPLY TO RESPONDENT'S ARGUMENT

1. The Respondent seeks to couch the proceeding below as an attempt to reverse the decision of the Florida Supreme Court and order the Petitioner's reinstatement as a member of the Florida Bar. That argument has no support in the record below and is utterly inaccurate. Rather, as permitted by the Respondent's own rules, adopted in response to decisions by this Court, the Petitioner sought to discredit the decision of the Florida Supreme Court as unsupported by the record, based on proceedings materially deficient in due process and to demonstrate that disbarring the Petitioner before the Respondent would be fundamentally unfair.

2. The Respondent claims that the Petitioner's argument below was based on the fact that his conduct was reckless rather than intentional. That is a fabrication with no support in the record below. The Petitioner instead indicated that, based on the current definitions of "recklessness," he ought never to have been considered as having acted recklessiy. That is especially true when the Securities and Exchange Commission's findings of fact in the related case of Gallagher & Co., Russell K. Gallagher and Laura K. Gallagher v Commission, Appeal Number 91-5476 (11th Cir. 1992), *rehearing denied* (the "Gallagher Case"), are considered. Such findings included the following matters:

> " `William A. Calvo, III, informed Russell of the indictment ....
>
> After disbursements ... the remaining proceeds were

placed in a post-closing escrow account under the control of Granai purportedly pending verification of (1) Bremer's and Advertising's asserted expenditures on behalf of Warehouse, and (2) the dismissal of Bremer's indictment.

On May 1, more than a week after the closing, Calvo wrote to Granai requesting documentation for the claimed Warehouse debt to Advertising and the dismissal of Bremer's indictment. By then, the bulk of the proceeds had been disbursed. The record does not show that Granai ever responded to Calvo's letter, or that any further effort to obtain the documentation was made.[6]

Respondents point to three communications from attorneys with respect to the indictment: (i) Calvo's indication that an indictment in the process of being dropped would not be material to investors; (ii) Calvo's conclusion that the closing could be held subject to subsequent verification that the indictment would be dismissed, and (iii) Granai's opinion letter revised to downplay the indictment. However, prior to receiving any of these communications, respondents[7] sold Warehouse stock to investors without disclosing Bremer's indictment. Indeed, Calvo did not indicate that the indictment was being dropped until April 19, after all sales to investors had already been made.[8]

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6. More than most inconsistencies, this finding of fact by the Securities and Exchange Commission makes it obvious that Defendant William A. Calvo, III, neither intended to engage in any improper activities nor expressed the callous indifference required to constitute recklessness,

7. [The Gallaghers.]

Respondents argue that they relied on the termination date supplied by the escrow bank. They contend that it was the bank's responsibility --not theirs-- to calculate the termination date, and that any mistake in such calculation was not their responsibility but that of Calvo and Granai. We disagree.

Russell asserts he was assured by Calvo that Bremer could purchase the stock necessary to close the offering; that, prior to the closing, he was only aware of the loan from Richmond; and that, although $324,350 of the offering proceeds were used to repay that loan, Calvo advised Russell that this was proper since Bremer stated he was being reimbursed in this way for expenditures he had already made on Warehouse's behalf. Moreover, according to Russell, the post-closing escrow account was a safeguard in the event Bremer was lying.

Respondents contend that the law judge erred in allowing the Division of Enforcement to cross-examine Calvo on the basis of a Calvo deposition that had as many as 47 pages missing.'

In each of the foregoing quotes from the Gallagher case, substantial grounds exist for questioning the accuracy of the Securities and Exchange Commission's evidence in

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8. As developed in the Florida Bar proceeding by the Florida Bar's witness, Joe Caruncho, Defendant William A. Calvo, III, had been informed that the indictment had been dropped, not that it was in the process of being dropped. Because the entire incident was vague in Mr. Calvo's recollection, he had, until then, been unable to recall whether he had been told that the indictment had been dropped, or that dropping the indictment had been approved by the government, but that such determination was in a ministerial process of effectuation.

this action, for corroborating Mr. Calvo's allegations and establishing that Mr. Calvo lacked any intent to deceive or defraud anyone, rather, if anything, he merely disagreed with legal positions subsequently espoused by the Securities and Exchange Commission ...."

3. The Respondent's argument boils down to its assertion that attorneys subjected to bar disciplinary proceedings do not have a right to due process. That does not comport to this Court's prior decisions on point. Wright & Miller, *Federal Practice and Procedure*; West Publishing Co., 1996, at Section 3992 (Rule 46. Attorneys) contains the following relevant discussion:

> "... Under Rule 46(b), a member of the bar of any circuit is subject to suspension or disbarrment when it is shown to the court that (1) he has been suspended or disbarred from practice in any other court of record, or (2) he has been guilty of conduct unbecoming a member of the bar of the court. Such a member will be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing (if one is requested), or upon expiration of the time prescribed for a response if no response is made, the court will enter an appropriate order.
>
> Disbarrment proceedings are not to be taken lightly by either the court or the attorney involved. They have been described by the Supreme Court as being "adversary proceedings of a quasi-criminal nature" in which "the requirements of procedural due process must be met" before a disbarrment order is entered.[9] ...

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9. See In re Ruffalo, 1968, 88 S.Ct. 1222, 1226, 390 U.S. 544, 551,

> [T]he Supreme Court ... advised the federal courts that disbarrment from membership in a state bar should not automatically result in disbarrment by any federal court.[10] Thus when the accused attorney, in his return to the show cause order, not only requests a hearing but raises a credible objection to the state disbarrment procedures or results, the court of appeals must provide the "hearing" contemplated by Rule 46(b). And it must make its own independent assessment of the disbarrment charges .... One such device that has been used by both the Supreme Court and some circuits is the appointment of a committee of bar members in good standing to hold the hearing, gather the evidence and make recommendations to the court."

4. None of the Respondent's other arguments have any support in the record, which is comprised solely of the Petitioner's unrefuted but highly supported allegations.

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20 L.Ed.2d 117 ("These are adversary proceedings of a quasi-criminal nature"); Willner v. Committee on Character, 1963, 83 S.Ct. 1175, 1179-1180, 373 U.S. 96, 102, 10 L.Ed.2d 224 ("the requirements of due process must be met before a State can exclude a person from practicing law"). See also Ex parte Robinson, 1874, 86 U.S. (19 Wall.) 505, 22 L.Ed. 205.

10. See Theard v. U.S., 1957, 77 S.Ct. 1274, 1276, 354 U.S. 278, 282, 1 L.Ed.2d 1342: "Disbarrment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarrment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. *** The short of it is that disbarrment by federal courts does not automatically flow from disbarrment by state courts." See also In re Ruffalo, 1968, 88 S.Ct. 1222, 1224, 390 U.S. 544, 547, 20 L.Ed.2d 117; Selling v. Radford, 1917, 37 S.Ct. 377, 243 U.S. 46, 51, 61 L.Ed. 585.

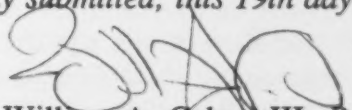
5. The Respondent claims that this case has no relevance to the national interest and its consideration is not worth the Court's valuable time. That is not true. The Court has a greater, direct interest in the operations of the federal court system than in almost any other matter. Where it appears that federal courts are engaging in violations of constitutionally guaranteed rights, the United States Supreme Court must intervene. This is especially important at a time when citizens are loosing faith in the government and resorting to violent confrontation, based at least in part on their perception that justice is no longer available through the courts.

While such intervention should take the form of granting the petition for writ of certiorari, this Court may also provide direct relief through its administrative authority over the federal court system or by invoking its summary disposition on the merits authority under Supreme Court Rule 16(1), without oral argument or further briefs. In that manner, justice can be done without appreciable expenditure of time.

CONCLUSION

For all of the reasons set forth, this Court should either grant the petition for certiorari or enter a summary order on the merits directing the United States Court of Appeals for the Eleventh Circuit to vacate its disbarrment of the Petitioner.

Respectfully submitted, this 19th day of April, 1996.



William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(352) 245-4126